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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEE FRANCIS, ANDREW ROBERT HARNEN, and ROY CHESTER DICKSON

Defendants and Appellants.

G047819

(Super. Ct. No. 08ZF0025)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed, with directions.

Rex Adam Williams, under appointment by the Court of Appeal, and Richard Pfeiffer for Defendant and Appellant Dee Francis.

Ann Hopkins, under appointment by the Court of Appeal, for Defendant and Appellant Andrew Robert Harnen.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant Roy Chester Dickson.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Dee Francis, Andrew Robert Harnen, and Roy Chester Dickson of multiple felony tax offenses related to an insurance fraud scheme. Specifically, the jury convicted Francis and Harnen of filing false personal income tax returns (Rev. & Tax Code, § 19705; all further statutory references are to this code unless noted), failing to file personal income tax returns (§ 19706), and failing to file corporate income tax returns (*ibid*). The jury also convicted Harnen of filing a false corporate return (§ 19705), and convicted Dickson of two counts of filing a false personal income tax return (*ibid.*). The trial court sentenced Francis to an aggregate prison term of six years, Harnen to five years and four months, and Dickson to two years and eight months.

Dickson contends the trial court erred in allowing the prosecutor to impeach with prior tax returns his claim he "always" overestimated his income on his personal tax returns. All three defendants argue the trial court erred in failing sua sponte to give an instruction on misdemeanor failure to file a tax return or filing a false tax return. Francis and Harden also argue the trial court neglected a sua sponte duty on some counts to instruct the jury on the necessity of a tax deficiency. Dickson raises two sentencing claims, asserting the trial court used his status as an improper factor in sentencing him to the middle term, and that the trial court was required to stay sentencing on one of his convictions under Penal Code section 654. The Attorney General argues, and we agree, that the abstract of judgment must be corrected as we explain below. Apart from those corrections, we affirm the judgment in all other respects.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, the Orange County District Attorney's Office uncovered a health insurance scam at Unity Outpatient Surgery Center, LLC (Unity), which paid bounties to patients and to patient recruiters, known as "cappers," to sign up healthy individuals for unnecessary surgical procedures. The bounties were substantial, totaling more than a $110,000 a year for one recruiter, for example. Unity, in turn, then billed the patients' insurers for millions of dollars, but as a fraud investigator explained at trial, these bounties violated state and federal law and therefore insurance companies were not obligated to pay for the resulting procedures. The investigator also explained that while an excessive number of procedures performed at a particular surgery center may trigger fraud alerts and closer claim scrutiny, the insurance payouts to Unity were obscured by billings from intermediary shell entities or limited liability companies (LLCs), and the bounties paid to patients and patient recruiters were similarly hidden.

Francis and Harnen held LLC member stakes in Unity and many of the shell companies. The investigation implicated both men and Dickson in the fraud scheme: Francis as vice president of operations, and Harnen in accounting, and Dickson to a lesser degree, for which they were later prosecuted. In the meantime, the trio's criminal troubles also led to the tax prosecution in this case.

Zsuzsanna Abeln supervised the Franchise Tax Board's (FTB) investigation. At trial, she explained the FTB investigates cases where a taxpayer has failed to file a tax return, or if a return was filed, the person underreported or misreported income. Abeln reviewed in turn her findings concerning Francis, Harnen, and Dickson.

A. *Francis*

1. Counts 11-13, 15 (Personal income tax returns)

Francis filed personal income tax returns through 2001, but not in 2002 through 2005. On his 2001 tax return, Francis reported income of $61,000, but Abeln's

investigation uncovered an additional $19,700 in unreported income. Abeln also discovered $690,000 in income that Francis earned between the years 2002 and 2005, for which he failed to file a return and paid no income taxes, including: $434,254 in 2002 and $33,687 in 2003.

2. Counts 16 & 17 (Francis-Drake Enterprises)

Francis failed to report income and pay taxes for several corporate entities he controlled. He incorporated Francis-Drake Enterprises Inc. (Francis-Drake) in November 2001, listing only himself on the signature card for Francis-Drake's bank account at Washington Mutual Bank. Based on the signature card identifying Francis as president of Francis-Drake, and the articles of incorporation naming him as chief financial officer, Abeln explained that corporate officers may be responsible for filing the corporate tax return. Francis-Drake filed no tax returns for 2002 or 2003 when $451,129 and $220,721 were deposited, respectively, into the corporation's bank account. Abeln also identified income distributed to various medical management LLCs in the fraud scheme that should have been reported as income to Francis-Drake.

3. Count 20 (Northridge Surgery Center)

Northridge Surgery Center, Inc. (Northridge) incorporated in March 2004 with Francis as its director, chief executive officer, and agent for service of process. As with his Francis-Drake company, Francis made no effort to ensure Northridge filed a tax return in 2004 and 2005 when insurance company payouts on Northridge's billing claims totaled $139,582 in 2004 and $664,726 for 2005.

B. *Harnen*

1. Counts 21-23 (Personal income tax returns)

Harnen filed personal income tax returns for the years 2000 through 2002, and for 2004 through 2006, but not 2003. Abeln's investigation showed Harnen underreported his income by $32,433 for 2002, by $55,535 for 2004, and that his total

unreported taxable income for 2003 was $76,912. In 2005, the FTB sent Harnen a notice of proposed assessment for a tax deficiency of just $1,537.83 in 2003, but the notice was based on an erroneous estimated income of $44,000 instead of $76,912.

2. Counts 24-26 (Antioch Management)

Harnen incorporated Antioch Management, Inc. (Antioch) in January 2002 and served as its sole corporate officer and director. Harnen filed a corporate tax return for Antioch in 2002, but Abeln determined Harnen underreported Antioch's income by $20,743. Antioch made a staggering $2,854,373 in 2003, but Harnen failed to file a tax return that year or the next year in which Antioch's income fell to $12,202.

3. Counts 28 & 29 (Liberty Management)

Liberty Management, Inc. (Liberty) incorporated in January 2002 with Harnen as its director, chief executive officer, chief financial officer, secretary, and agent for service of process. The signature card for Liberty's Citibank account lists Harnen as the sole authorized signer, as did Liberty's Union Bank account. Harnen filed a tax return for Liberty in 2002, but not in 2003 or 2004 on income of $271,302 and $54,292, respectively.

4. Count 32 (Southwest Surgical Group)

Harnen incorporated Southwest Surgical Group, Inc. (Southwest) in January 2004, listing himself as Southwest's director, chief executive officer, chief financial officer, secretary, and agent for service of process. Southwest's signature card at Nara Bank identified Harnen as its sole authorized signer. Southwest never filed a tax return, and in 2004 its unreported income was $138,514.

C. *Dickson*

Counts 39 & 40 (Personal income tax returns)

Dickson admitted in his trial testimony that he was "very loose" in his accounting habits, did not keep financial records for his law practice, commingled

income from his law practice and funds in his client trust account, and he preferred to be paid in cash. Deposits in his client trust account in 2003 totaled $329,120, but no evidence showed the sums were client trust funds. A search of Dickson's home yielded $105,000 in cash stored in a safe, which he claimed was personal income. For the 2003 tax year, he initially reported an adjusted gross income of only $18,829 on gross receipts of $85,173, with a claimed net, taxable income of $0 because his expenses exceeded his income. After authorities searched his home and office, Dickson filed an amended return for 2003 in which he reported an adjusted gross income of $117,739 on claimed gross receipts of $188,926. Abeln reviewed the bank records related to Dickson's client trust account and identified amounts withdrawn that were attributable to him as income. Abeln also identified other payments made to Dickson that were not included in his reported income. The jury convicted Dickson of filing both a false return and a false amended return for the 2003 tax year.

II

DISCUSSION

A. *Impeachment*

Dickson contends the trial court erred by allowing the prosecutor to impeach his claim that he "always" erred on the side of overstating his income when filing his taxes, including in 2003 when he filed his original return that reported gross income of $85,173 and when he filed his amended return that year reporting gross income of $188,926. Specifically, Dickson testified he "always felt that I overestimated" income in filing his taxes, and on cross-examination characterized his manner of filing his annual return: "I always felt that the numbers I gave were an overestimate of what I had earned."

When the prosecutor asked Dickson, "Was it just the 2004 and 2003 taxes you say you overestimated or are you saying that you always use an abundance of caution," the trial court overruled Dickson's objection, and Dickson answered, "[T]hat's

correct. That's my belief." The prosecutor continued, "So it's your belief that you overpaid not only the 2004 and the 2003 returns, but also as far back as 1999, those were overpaid?" Dickson responded, "My word is not overpaid. I said I believe I overestimated my income." The prosecutor then sought to question Dickson about his earlier returns over Dickson's objection that they were irrelevant. The trial court overruled the objection and admonished the jury: "[T]here is some relevant purposes. It's a limited purpose, and it is certainly not to show — it is not admissible for you to consider whether or not any defendant, to use the vernacular, is a tax scofflaw or something like that or is a bad person. But it may show lack of mistake or it may show some other things that I will tell you about specifically when I give you the final instructions. So I'm going to permit examination in this area but it is for a limited purpose. And it certainly is not to establish that anyone is a bad person or something like that. All right? Go ahead."

The prosecutor questioned Dickson about his 1999-2001 tax returns and established in each one that Dickson reported a low income compared to his claimed expenses and deductions; indeed, in each year he reported a net income that was less than his expenses and deductions. For example, in 1999 he reported a net income of $13,000 based on itemized deductions totaling $29,000. When the prosecutor asked, "Where [did] you come up with the cash to pay for about 29,000 in itemized deductions," Dickson answered in a manner the jury could consider evasive, stating that he had "no recollection" about "specific numbers." (See *People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 [trier of fact has exclusive authority to judge witness credibility].)

We review a trial court's evidentiary rulings for abuse of discretion (*People v. Waidla* (2000) 22 Cal.4th 690, 717), and find no error.

The crux of Dickson's appellate challenge is his correct observation that a taxpayer does not have to pay expenses with income earned in the same year, and therefore a low reported income in comparison to claimed expenses does not necessarily

indicate unreported income. Accordingly, Dickson argues it was "incumbent on the prosecutor to show the taxpayer did not have non-taxable resources from which to pay those expenditures." (Citing *Taglianetti v. U.S.* (1st Cir. 1968) 398 F.2d 558, 562.) Absent such a showing, Dickson insists no inference could be drawn that he underreported his income in previous years, and therefore those prior returns were irrelevant to impeach the credibility of his claim he "always" overreported his income. The flaw in Dickson's argument is simply that the prosecutor *did* ask him where he "c[a]me up with the cash" to pay his claimed expenses, and when Dickson answered evasively, the jury could infer he lacked the independent resources to pay those expenses and instead underreported his actual income. There was no missing predicate in the prosecutor's impeachment theory.

Dickson's fallback argument is that the probative impeachment value of delving into his prior returns was minimal, and should have been precluded under Evidence Code section 352. He relies on authority noting generally that tax returns from uncharged years can have "a tendency to prejudice the jury and confuse the issues" by portraying the defendant "as a tax criminal, not a person on trial for committing particular tax crimes." (*People v. Smith* (1984) 155 Cal.App.3d 1103, 1118 (*Smith*), disapproved on another ground in *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 833.) But the trial court addressed this issue sua sponte by admonishing the jury. Moreover, Dickson objected below only on relevance grounds, not prejudice, and, in any event, evidence that is damaging to the defense is not the prejudice against which Evidence Code section 352 guards. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) There was no error.

B. *Instructions*

1. Lesser Included Misdemeanor Offense

Defendants argue the trial court erred in failing sua sponte to instruct the jury it could return misdemeanor verdicts rather than acquit the defendants if it

determined their filing of a false tax return or failure to file a return was not a willful act, or was not committed with the intent to evade taxes. Specifically, defendants contend the jury should have been instructed that the misdemeanor offenses of filing a false tax return and failing to file a return without a willful intent to evade taxes (§ 19701) are lesser included offenses of their respective felony counterparts (§§ 19705, 19706.) The absence of willfulness or an intent to evade taxes distinguishes the misdemeanor offenses of filing a false return and failing to file a return (§ 19701) from the felony offenses of filing a false return (§ 19705) and failing to file a return (§ 19706). (*People v. Hagen* (1998) 19 Cal.4th 652, 672-673; *Smith*, *supra*, 155 Cal.App.3d at pp. 1182-1183.)

The trial court must instruct the jury on lesser included offenses, even in the absence of a request, when evidence the lesser offense may have been committed is "'substantial enough to merit consideration' by the jury. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) The trial court has no duty to instruct on lesser included offenses absent substantial evidence. (*Ibid.*) "'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Ibid.*)

As a preliminary matter, the Attorney General notes that section 19701 was amended in 2005 after defendants committed their tax offenses, but before the 2012 trial. The amended version of section 19701 includes additional elements for misdemeanor filing a false tax return and failure to file a tax return. For example, unlike former section 19701 or the felony offenses defined in sections 19705 and 19706, the misdemeanor tax offenses defined in section 19701 now require proof that the conduct occurred over a period of two years or more and resulted in a tax liability of more than $15,000. (§ 19701.)

The Attorney General argues that with the addition of these new elements, section 19701 at the time of trial was no longer a lesser included offense of willful tax

evasion (§§ 19705, 19706), and she contends this forecloses defendants' claim a lesser included instruction should have been given. In other words, the changes to section 19701 moot defendants' contention that a lesser included instruction should have been given. The mootness arises, according to the Attorney General, because with the addition of the new elements in section 19701, the misdemeanor tax offenses defined in section 19701 were no longer lesser included offenses of their felony counterparts in sections 19705 and 19706.

Legislative changes usually only apply prospectively to criminal conduct that occurs after the enactment, unless there is an express statement of retroactivity (Pen. Code, § 3), but the Attorney General relies on the principle that changes in law decriminalizing formerly illegal behavior generally apply to cases that are not yet final. (E.g., *People v. Rossi* (1976) 18 Cal.3d 295, 298-299 (*Rossi*).) The Attorney General argues this retroactivity principle applies because in adding elements to the misdemeanor tax offense (§ 19701), the Legislature effectively reduced punishment by decriminalizing conduct that lacks those elements.

We agree the legislative changes to section 19701 operated retroactively. Thus, by the time defendants were tried, they no longer were subject to misdemeanor charges even though that conduct that would have been a misdemeanor when defendants committed it. (See *People v. Nasalga* (1996) 12 Cal.4th 784, 793 [adding elements or otherwise increasing threshold for punishment is retroactive]; *People v. Estrada* (1965) 63 Cal.2d 740 [court may infer Legislature intended retroactivity when it acts to lessen punishment for a crime].) In *Rossi*, the high court held that *Estrada*'s retroactivity principles apply "a fortiorari when," as here, "criminal sanctions have been completely repealed before a criminal conviction becomes final." (*Rossi*, supra, 18 Cal.3d at p. 301.) As *Rossi* noted, it would be "absurd" to conclude that retroactivity applies where the Legislature has reduced the punishment for a felony to one day in jail, but not to a statutory amendment decriminalizing the conduct altogether. (*Id.* at p. 302, fn. 8.) Here,

by adding elements to section 19701, the Legislature effectively repealed misdemeanor sanctions for defendants' alleged conduct. Based on the additional elements required at the time of trial to establish a misdemeanor tax offense under section 19701, the offense was no longer a lesser included offense of sections 19705 or 19706. Consequently, the trial court did not err in failing sua sponte to give the jury lesser included offense instructions based on section 19701.

2. Tax Deficiency

Francis contends the trial court erred by failing sua sponte to instruct the jury on count 17 (Francis-Drake corporate taxes) that criminal liability for failure to file a corporate tax return requires a tax deficiency. Harnen makes the same argument regarding count 32 (Southwest corporate taxes). We are not persuaded. In *People v. Mojica* (2006) 139 Cal.App.4th 1197, 1202-1205 (*Mojica*), the court explained that former CALJIC No. 7.76 did *not* adequately explain the prosecution's duty to prove a tax deficiency. But the trial court did not use that instruction but rather its successor (CALCRIM No. 2801), which the *Mojica* court cited favorably. As *Mojica* explained, "CALCRIM No. 2801 *does require proof of a tax deficiency*, stating that '[The People do not have to prove the exact amount of (unreported income/[or] [additional] tax owed). The People must prove beyond a reasonable doubt that the defendant (failed to report a substantial amount of income/[or] owed a substantial amount in [additional] taxes.]'" (*Mojica*, at p. 1204, fn. 4, italics added.)

Defendants attempt to distinguish *Mojica* on grounds that it involved CALJIC No. 7.76, not CALCRIM No. 2801, and therefore they invoke the proposition that cases are not authority for propositions unnecessary to the decision. (*People v. Nguyen* (2000) 22 Cal.4th 872, 879.) But *Mojica*'s discussion of CALCRIM No. 2801 was not mere dicta because the contrast the court drew in the tax deficiency's presence in CALCRIM No. 2801 and absence in CALJIC No. 7.76 was essential to its analysis.

Defendants make no effort to challenge that analysis, and their claim is therefore forfeited.

Moreover, we discern no basis for a successful challenge. True, CALCRIM No. 2801 states that the People may prove its case by two alternatives, *either* by showing beyond a reasonable doubt "that the defendant failed to report income *or* [that it] owed additional taxes." Conceivably the former — proving that the defendant failed to report income — might not result in a tax deficiency if, for example, the unreported income still resulted in a negative net income because of valid deductions or expenses. But the trial court accounted for this possibility in another instruction, telling the jury the corporate tax due is "8.84 percent of its *net* income for the preceding income year or, if greater, the minimum franchise tax of $800." Accordingly, Francis's failure to file a tax return for Francis-Drake in 2003 necessarily resulted in a tax deficiency because he failed to pay any corporate taxes that year, including the $800 minimum.

Harnen relies on the fact that the $800 minimum does not apply in a corporation's first year (§§ 23153, subd. (d)(1), 23151, subd. (f)(1)), as was the case for Southwest in 2004, the year on which count 32 was based. But any error in failing to instruct the jury expressly that it had to determine Southwest owed a tax deficiency that year is harmless because the trial court *did* instruct the jury the 8.84 percent rate on net income still applied to the first year, *and* there was no reasonable possibility the jury would conclude Southwest had a net negative income that year. To the contrary, Abeln's forensic accounting revealed Southwest's gross income in 2004 was $156,936, with $18,422 in allowable deductions, resulting in a substantial tax deficiency (calculated at 8.84 percent) on $138,514 in unreported net income.

Indeed, Harnen concedes Abeln "may have properly determined that $18,460 of the company's 2004 expenses were payments to cappers[1] and therefore not

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1 "Cappers" is a shorthand term for individuals paid to recruit patients.

allowable as deductions." (See § 17282, subd. (a); CALCRIM No. 2841 [No Deductions on Gross Income from Illegal Conduct].) More to the point, however, Harnen makes no effort to show under *any* calculation that Southwest's expenses in 2004 exceeded income, and therefore Harnen has failed his burden to demonstrate prejudicial error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

C. *Sentencing*

1. Middle Term

Dickson asserts the trial court used his status as an attorney and his conviction's potential damaging effect on the legal profession as improper sentencing factors when it imposed an aggregate prison term of two years and eight months. The argument fails for several reasons, including that Dickson forfeited his challenge because he failed to raise it at sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 356 ["complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal"]; *People v. Steele* (2000) 83 Cal.App.4th 212, 226 [objection raised for first time on appeal to alleged aggravating factor is forfeited].)

Even overlooking the forfeiture, Dickson's challenge fails both factually and legally. The challenge fails legally because although a defendant's profession or deviation from ethical standards is not listed as an aggravating factor (see Cal. Rules of Court, rule 4.420(b)), the sentencing court may consider circumstances that make the offense worse or render the defendant "deserving of punishment more severe than that merited for other offenders in the same category." (*People v. Black* (2007) 41 Cal.4th 799, 817.) Dickson's challenge also fails factually because it does not appear the trial court used Dickson's profession as a sentencing factor. The court rejected the prosecution's request for an upper term, imposing a middle term as the base term for each defendant.

In particular, noting that several of the original codefendants had pleaded guilty and received lengthy prison sentences, the court observed regarding Francis, Harnen, and Dickson "that people involved in similar conduct should receive similar sentences unless there's something extraordinary to differ." The court found nothing significantly different about Dickson in the tax prosecution because, like the others, he had committed tax fraud. The court treated defendants' ages in their 50's and 60's as a mitigating factor, and noted they had little or no prior criminal history, although Dickson had a prior offense in Michigan when he was younger and had been disciplined by the California State Bar. But the court viewed defendants' active participation in a major fraud and their lack of remorse as aggravating factors. The court did not believe Dickson's claims that he lacked any intent or knowledge of what the tax laws required or what his income and expenses were.

In imposing the middle term, the trial court remarked to Dickson: "I was going to talk to you a little more but I've gone on longer than I intended to. I will only observe that, frankly, you are in a different position in a positive way for the reasons I've noted. You came on the scene later. You were not as integral a part of the massive fraud but Mr. Pham Vu [the principal fraud mastermind, charged in the underlying offenses] needed a good aggressive lawyer to do what he was doing and you were the guy. [¶] You have a higher responsibility. You know it and I know it. The reason that lawyers in our justice system do not receive from members of this community and the public in general the level of respect that they should receive, since this is a country based on the rule of law, is because members of the community thinks — think that lawyers by and large do their job by lying and cheating and stealing. [¶] And the reason, at least one reason they have that perception is they read about cases like this in the newspaper, which they'll probably do tomorrow in the *Register* or the *Times* or some of our local newspapers or on the Internet. And they'll see, unfortunately, a lawyer with your education, training, and experience went to UCLA law school, practiced in this

community for, what, 30 years, has been convicted of felonies and sentenced to prison because he got caught lying, cheating, or stealing.

"So it reinforces the impression that people have of this profession in the most negative way possible. You and I both know that most lawyers don't practice that way; that most lawyers are mindful of their ethical and legal obligations. And they're vigorous advocates but they practice with professionalism and integrity, which is lost on members of the public because they don't see it. What members of the public see are ugly situations like this. [¶] So if you go on the *Register* Website tomorrow, you'll probably see people who don't know what they're talking about talking about the system and another lawyer getting convicted. And I don't know you well, Mr. Dickson, but your —our paths have crossed professionally over the years. And it's particularly sad for me to send you to prison all things considered. You always in my court seemed to vigorously and professionally represent your clients, and now here you are.

"It's a very sad situation, Mr. Dickson. And I don't get any great pleasure of sentencing any of you folks to prison today, but perhaps Mr. Dickson I regret the most. The rest of you folks were in it for a long time up to your elbows and you know what you were into. Maybe at least initially Mr. Dickson didn't know what he was getting himself into, but at some point he certainly did. And he knew he had income and he knew he wasn't filing tax returns."

The court's comments reflected that it knew and respected Dickson's legal acumen from prior court appearances, and that it understood how the case might reflect poorly on lawyers in the court of public opinion, but that, ultimately, Dickson's sentence turned on the acts he committed and his personal culpability. A trial court has broad discretion in selecting the upper, middle, or lower term of imprisonment. (Pen. Code, § 1170, subd. (b); *People v. Clancey* (2013) 56 Cal.4th 562, 579; Cal. Rules of Court, rule 4.420(b).) The court did not err factually or legally in mentioning Dickson's role as

a lawyer in the underlying fraud, nor did the court abuse its discretion in imposing the middle term.

2. Penal Code Section 654

Dickson asserts the trial court erred by failing to stay under Penal Code section 654 (all statutory references in this subsection are to this code) his conviction on count 40 for filing a false amended return because it was committed for the same objective as filing a false original return as alleged in count 39, namely, "to not report his true gross income for 2003 to the taxing authorities." The trial court did not err.

"Section 654 prohibits multiple sentences where a single act violates more than one statute, or where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct with a single intent and objective. [Citation.]" (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1514.) But here Dickson committed different instances of the same act at different times violating the same statute. It is "clear that a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11.) "This is particularly so where the offenses are temporally separated in such a way as to afford the defendant [the] opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

Here, as the trial court noted in imposing consecutive sentences, Dickson failed to file a return when it was due in 2003, then filed a late but false return, and then filed a second false return even when it became clear he was under investigation. Under these circumstances, the trial court reasonably could find similar but consecutive objectives permitting multiple punishment. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212.)

3. Corrections to Abstract of Judgment

The Attorney General contends the abstract of judgment for Francis and Harnen should be corrected to reflect they received felony state prison sentences for their offenses under section 19706, rather than a jail term. Harnen concedes the issue, and we agree the abstracts should be amended. Section 19706 is a wobbler that prescribes punishment for up to a year in the county jail or for an unspecified term in state prison. For felonies with an unspecified term, Penal Code section 18 provides for a state prison commitment of 16 months, 2 years, or 3 years at the trial court's discretion, "*unless* the offense is punishable pursuant to subdivision (h) of [s]ection 1170," which provides for a county jail commitment. (Italics added.) The Legislature's use of the word "unless" in Penal Code section 18 demonstrates an intent under the 2011 Realignment Act to restrict county jail commitments for felony offenses to lower-level offenses the Legislature specifically designates as punishable under Penal Code section 1170, subdivision (h). For example, transporting most illegal drugs is now punishable "*pursuant to subdivision (h) of [s]ection 1170 of the Penal Code* for a period of two, three, or four years." (Health & Saf. Code, § 11379, subd. (a), italics added.)

Based on the restrictive use of "unless" in Penal Code section 18, "state prison remains the default punishment for felony convictions even after realignment, unless the offense is punishable pursuant to subdivision (h) of section 1170." (*People v. Vega* (2014) 222 Cal.App.4th 1374, 1382.) Here, section 19706 does not specify that felony wobblers committed under its terms are punishable under Penal Code section 1170, subdivision (h). Consequently, the provision in that section for county jail incarceration does not apply, and the abstracts of judgment for Francis and Harnen therefore must be amended to reflect a state prison commitment.

As the Attorney General also points out, Francis's abstract of judgment also should be amended to reflect his conviction under section 19706 on count 20, which was omitted.

III

DISPOSITION

The trial court is directed to correct (Pen. Code, § 1260) the abstracts of judgment for Francis and Harnen to reflect state prison felony sentences under section 19706, and to reflect Francis's conviction under section 19706 on count 20. The trial court shall then forward copies of the corrected abstracts of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.